RHB Bank Bhd (formerly known as DCB Bank Bhd) v Samaworld Asia Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–745 OF 1996
ABDUL WAHAB PATAIL J
26 JANUARY 2005

Contract — Collateral contract — Existence of — Facilities agreement — Mandate given to plaintiff to help to sell 20–30 million shares — Whether such sales represent the sole method of repayment of the loan facility

The plaintiff claimed against the first and the second defendant the sum of RM3,645,154.48. By a letter dated 15 August 1992 SamaWorld Asia Sdn Bhd ('the first defendant') had given to Rakyat Merchant Bankers Bhd ('RMBB') (whose assets and liabilities were later vested and transferred to the plaintiff), a mandate to help to sell 20–30 million shares held by the first defendant in its subsidiary SamaWorld (Malaysia) Sdn Bhd ('SamaWorld Malaysia'). The mandate was non exclusive. The first defendant agreed to pay 2% commission to RMBB. The first defendant made an application for a loan to RMBB. RMBB's letter of offer dated 29 October 1992 set out the terms of its offer. The purpose of the facility was a bridging loan for the funding of a project of SamaWorld Malaysia, known as SamaWorld Theme Park, before receipt of the proceeds of sale of the first defendant's shares in SamaWorld Malaysia to investors. The second defendant as guarantor and the first defendant failed to make payment on the loan facility. The defendants alleged that there was an oral collateral contract. Among the salient terms of the collateral contract was that the proceeds from the placing out of the SamaWorld shares by the plaintiff would represent the sole method of repayment of the loan facility by the first defendant. The first defendant counterclaimed for the sum of RM3m being the loan amount.

Held, allowing plaintiff's claims:

(1) Nothing in the RMBB's letter of offer referred to the source of repayment as the sale of the 10m shares. Indeed, while it is true the first defendant offered the source of repayment as out of the sale of the 10m shares, there was no suggestion even by the first defendant that was the sole source of repayment. It was inconceivable that any lender would accept the sale of assets in the form of shares as the sole source of repayment, for that would deny it from other avenues of recourse if the sale of shares would fail. The terms of the letter of offer make it abundantly clear that RMBB was not ready to deny itself other avenues of recourse (see para 32).

(2) It is trite that the purpose of a loan does not confine the source of repayment of the loan from that purpose only. While the purpose of a loan may be an investment that is the source of expectations of obtaining money for repayment, too often such investments become the source of grief since risk is inherent in business ventures. On the other hand, a lender, holding the money, has the luxury of demanding security to minimise of not eliminating any risk of non-repayment. The sale of the shares to Perbadanan Kemajuan Negeri Selangor and to other potential investors had not shown to be compelling reasons for RMBB to forgo the usual recourse to security for repayment (see para 34).

(3) The short term facility agreement dated 12 November 1992 was silent as to the source of repayment. The silence as to source of repayment kept open the source of repayment. Since there was no rule that only a borrower whose use of the loan was successful needed to repay whilst one who failed was not obliged to pay, it followed that the source of repayment was irrelevant but a borrower must repay. The letter of undertaking dated 13 November 1992 by the first defendant, and the guarantee as required under the letter of offer were consistent with this conclusion (see para 35).

(4) It was evident that the defendants had failed to prove on a balance of probabilities the existence of an oral collateral contract that the sole source of repayment of the facility was from the sale of the charged shares, and the defence on this ground must fail (see para 46).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan pertama dan kedua sejumlah RM3,645,154.48. Melalui surat bertarikh 15 Ogos 1992 SamaWorld Asia Sdn Bhd ('defendan pertama') telah memberikan Rakyat Merchant Bankers Bhd ('RMBB') (yang mana aset-aset and liabiliti-liabilitinya kemudiannya diserahhak (vested) dan dipindahkan kepada plaintif) satu mandat untuk membantunya menjual 20–30 juta saham yang dipegang oleh defendan pertama di anak syarikatnya SamaWorld (Malaysia) Sdn Bhd ('SamaWorld Malaysia'). Mandat tersebut adalah tidak eksklusif. Defendan pertama bersetuju untuk membayar komisyen 2% kepada RMBB. Defendan pertama memohon kepada RMBB untuk satu pinjaman. Surat tawaran RMBB bertarikh 29 Oktober 1992 menyatakan terma-terma tawarannya. Tujuan kemudahan itu adalah satu pinjaman bridging untuk membiayai satu projek SamaWorld Malaysia, yang dikenali sebagai SamaWorld Theme Park, sebelum memperolehi hasil jualan saham-saham defendan pertama di SamaWorld Malaysia kepada pelabur-pelabur. Defendan kedua sebagai penjamin dan defendan pertama gagal untuk membuat bayaran atas fasiliti pinjaman tersebut. Defendan-defendan menyatakan bahawa terdapat satu kontrak kolateral lisan. Di antara yang lain, terma-terma penting kontrak kolateral tersebut ialah bahawa hasil daripada jualan saham-saham SamaWorld oleh plaintif akan merupakan satu-satunya cara pembayaran balik ke atas kemudahan pinjaman oleh defendan pertama.

Tuntutan balas defendan pertama jumlah RM3j yang merupakan amaun pinjaman.

Diputuskan, membenarkan tuntutan-tuntutan plaintif:

(1) Surat tawaran RMBB tidak merujuk kepada cara pembayaran balik adalah daripada penjualan 10 juta saham tersebut. Sememangnya, jika benar defendan pertama menawarkan cara pembayaran balik daripada penjualan 10 juta saham, namun tiada cadangan malah daripada defendan pertama bahawa ini merupakan satu-satunya cara pembayaran balik. Ia adalah sukar dipercayai bahawa mana-mana pemberi pinjaman akan menerima jualan aset dalam bentuk saham-saham sebagai satu-satunya cara pembayaran balik, oleh kerana ia akan menafikannya daripada peluang-peluang yang lain untuk menuntut balik sekiranya jualan saham-saham tersebut gagal. Terma-terma surat tawaran adalah jelas bahawa RMBB tidak bersedia untuk menafikan dirinya daripada peluang-peluang yang lain untuk menuntut balik (lihat perenggan 32).

(2) Adalah biasa bahawa tujuan pinjaman tidak terhad kepada cara pembayaran balik pinjaman tersebut untuk tujuan tersebut sahaja. Sementara tujuan satu pinjaman kemungkinan untuk perlaburan yang mana adalah sumber yang diharapkan untuk mendapatkan wang bagi pembayaran balik, selalunya perlaburan sedemikian mendatangkan kedukaan oleh kerana risiko sedia ada dalam menceburi bidang perniagaan. Selain daripada itu, seseorang pemberi pinjaman, memegang wang tersebut, mempunyai kelebihan untuk menuntut jaminan bagi mengurangkan atau menghapuskan sebarang risiko tiada pembayaran balik. Penjualan saham-saham kepada Perbadanan Kemajuan Negeri Selangor dan kepada pelabur-pelabur berpotensi yang lain tidak menunjukkan satu alasan yang mendorong RMBB untuk melepaskan jaminan pembayaran balik (lihat perenggan 34).

(3) Perjanjian kemudahan jangka pendek bertarikh 12 November 1992 tidak menyatakan cara pembayaran balik. Cara pembayaran balik yang tidak dinyatakan membuka peluang untuk cara-cara pembayaran balik yang lain. Oleh kerana tiada peraturan bahawa hanya peminjam yang dapat menggunakan pinjaman tersebut dengan berjaya perlu membayar balik sementara seseorang yang gagal tidak perlu membayar balik, ia diikuti bahawa cara pembayaran balik adalah tidak relevan tetapi seseorang peminjam harus membayar balik. Surat akujanji bertarikh 13 November 1992 oleh defendan pertama, dan jaminan yang diperlukan di bawah surat tawaran tersebut adalah konsisten dengan kesimpulan ini (lihat perenggan 35).

(4) Adalah dibuktikan bahawa defendan-defendan telah gagal untuk membuktikan atas imbangan kebarangkalian kewujudan satu kontrak kolateral lisan bahawa satu-satunya cara pembayaran balik kemudahan tersebut adalah daripada penjualan saham-saham yang dicagarkan, dan pembelaan atas alasan ini mestilah gagal (lihat perenggan 46).]

Notes

For a case on the existance of collateral contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2636.

Cases referred to

Heilbut, Symons & Co v Buckleton [1913] AC 30 (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Evidence Act 1950 ss 91, 92

Adrian Hii (WT How with him) (Shook Lin & Bok) for the plaintiff.
Mark Lau (Leong Phaik Leng with him) (Sivananthan) for the defendant.

Abdul Wahab Patail J:

[1] By this civil suit the plaintiff claimed against the first and the second defendants and each of them:

(a) the sum of RM3,645,154.48;

(b) Interest on the principal of RM3m at the rate of 2% per annum above the plaintiff's costs of funds calculated on a daily basis from 1 October 1996 to the date of full payment;

(c) additional default interest on the outstanding interest charged on the sum of RM3m at the rate of 3% per annum over and above the plaintiff's costs of funds calculated on a daily basis with monthly rests from 1 October 1996 to date of full payment;

(d) cost on a solicitor and client basis; and

(e) such further and/or other relief as this honourable court deems fit.

[2] At the end of the trial the court ordered entered judgment for the plaintiff in terms of prayers (a), (b), (c) and (d).

THE BACKGROUND

[3] By a letter dated 15 August 1992 SamaWorld Asia Sdn Bhd ('the first defendant') had given to Rakyat Merchant Bankers Bhd ('RMBB') a mandate to help to sell 20-30 million shares held by the first defendant in its subsidiary SamaWorld (Malaysia) Sdn Bhd ('SamaWorld Malaysia'). The mandate was non exclusive. The first defendant agreed to pay 2% commission to RMBB.

[4] The terms of the letter of offer dated 4 November 1992 and the facility agreement dated 12 November 1992 between RMBB and the first defendant provided, inter alia, the following terms:

(a) The purpose of the facility is a bridging loan for the funding of a project of SamaWorld Malaysia, known as SamaWorld Theme Park, before receipt of the proceeds of sale of the first defendant's shares in SamaWorld Malaysia to investors.

(b) The facility shall be repaid within three months from the date of draw-down of the loan.

(c) The first defendant shall execute a memorandum of deposit of shares under which the first defendant would charge 10m of its shares in SamaWorld Malaysia to RMBB.

[5] A memorandum of deposit was duly executed by the first defendant on 12 November 1992. The memorandum of deposit is over 10m shares, being a portion of the 20–30 million shares that the first defendant had earlier mandated RMBB to sell.

[6] The loan facility was, pursuant to a written notice of draw down by the first defendant, released on 16 November 1992. It was due for full settlement on 16 February 1993. Subsequently, on or about 13 June 1994 RMBB granted an extension of time for the repayment of the loan facility up to 31 May 1995 or upon completion of the sale of the 10m SamaWorld (Malaysia) shares whichever is earlier. RMBB also reiterated that all other terms and conditions of the loan facility remained unchanged. The first defendant accepted the extension of the repayment period for the loan facility vide their letter dated 21 June 1994.

[7] Pursuant to the Banking and Financial Institutions Act 1989 and by an order of court dated 7 November 1996, all, inter and (previously vested into BSN Merchant Bank Bhd vide the order dated 22 July 1995) were further vested and transferred to the Plaintiff as of 1 October 1996. It was also ordered thereunder, inter alia, that any accounts, agreements, contracts or instruments which RMBB (whose assets and liabilities previously vested into BSN Merchant Bank Bhd) was a party shall have effect as from 1 October 1996 as if the plaintiff has been a party thereof instead of RMBB (whose assets and liabilities were previously vested into BSN Merchant Bank Bhd).

[8] As at 30 September 1996, the first defendant remained indebted to BSN Merchant Bank Berhad in the sum of RM3,645,154.48. The first defendant failed to make payment on the loan facility despite demands from RMBB and BSN Merchant Bank Berhad. BSN Merchant Bank Berhad through its solicitors, Messrs Shook Lin & Bok, had on 22 August 1996 issued a letter to the first defendant demanding payment of the sum of RM3,576,277.83 being the outstanding amount due and payable as at 31 July 1996 together with interest thereon. The first defendant had failed, neglected and refused to effect payment of the outstanding sums or any part thereof.

[9] By a letter dated 10 October 1996, the plaintiff through its solicitors terminated the loan facility and declared that all outstanding sums owing under the loan agreement shall become due and payable immediately under to s 14.1 of the loan agreement.

[10] On 15 October 1996, the plaintiff through its solicitors had issued a letter of demand to the second defendant demanding payment of the sum of RM3,576,277.83 being the outstanding balance owing by the first defendant as at 31 July 1996 and interest thereon.

[11] The first and second defendant have failed, neglected and/or refused to repay the sums claimed or any part thereof.

THE DEFENCE

[12] The defendants alleged that there was an oral collateral contract. It was pleaded in their statements of defence that there was a collateral contract to the loan agreement dated 12 November 1992 and the memorandum of deposit of shares dated 12 December 1992 between the plaintiff and the first defendant ('the collateral contract'), the salient terms of the collateral contract being as follows:

(a) That the plaintiff would provide the loan facility;

(b) That the first defendant would utilise the entire loan facility to repay an existing loan facility obtained by one Sama Corporation Sdn Bhd, for the principal sum of RM3m which was issued in or about 1983 ('the Sama Corp facility');

(c) The first defendant would pledge 10m of its shares in SamaWorld (Malaysia) Sdn Bhd the SamaWortd shares') to the plaintiff for the purpose of the plaintiff placing out the same to investors;

(d) That the proceeds from the placing out of the SamaWorld shares by the plaintiff would represent the sole method of repayment of the loan facility by the first defendant;

(e) That as a consequences thereto, the plaintiff would assist in raising finance for one of the first defendant's developments in a subsidiary company, SamaWorld (Malaysia) Sdn Bhd ('the SamaWorld financing').

[13] The first defendant further contended in their statement of defence that subsequently a payment of approximately RM7,800,000 as full settlement of the Sama Corp facility was paid by one Samanda Holdings Bhd ('Samanda'), the corporate guarantor for the Sama Corp facility to the plaintiff. The first defendant contended it has no knowledge of the whereabouts of the loan amount or what it has been used for by the plaintiff, that there has been a failure of consideration. Hence, paras 19, 20 and 21 of the statement of claim are admitted in so far as the letters referred to therein were issued, but the defendants deny being indebted to the plaintiff in the sum of RM3,645,154.48 or at all as asserted in paras 17, 18, 22 and 23 of the statement of claim.

[14] The first defendant counter claimed for the following:

(a) the sum of RM3m being the loan amount;

(b) interest payments made by the first defendant to the plaintiff in respect of the loan amount amounting to RM582,837.54;

(c) the value of the SamaWorld shares amounting to RM10m;

(d) in the alternative to (c) above, an injunction compelling the plaintiff, by its directors, officers, servants, or agents to the return SamaWorld shares;

(e) general damages for breach of contract and breach of fiduciary duties;

(f) interest at the rate of 8% per annum calculated from the date of breach to the date of full settlement;

(g) costs; and

(h) such further and other relief as this honourable court deems just and fit.

[15] The second defendant similarly alleged that there existed a collateral contract to the loan agreement between RMBB and the first defendant ('the collateral contract'), and asserted that the second defendant shall refer to the court all the relevant correspondence exchanged between the plaintiff and the first defendant confirming the existence of the collateral contract. The second defendant averred that under and pursuant to the collateral contract, it is the duty and obligation of RMBB to ensure that the placing out of the SamaWorld shares be done within the three months repayment period, failing which the said repayment period shall be extended. The second defendant stated that the memorandum of deposit of SamaWorld shares was given to RMBB not as a security but in accordance to the collateral contract.

[16] Further, save and except for the fact that the second defendant had at the request of RMBB, executed some blank guarantee forms some time after the loan agreement was signed, the second defendant denied para 14 of the statement of claim in toto.

[17] The second defendant also averred that he has not until now received a copy of the said guarantee. The second defendant alternatively stated that the said guarantee was void for lack of consideration as the same was executed after the loan agreement. The second defendant alternatively stated that he had only agreed to guarantee up to a limit of RM1m and not RM3m. In the alternative, the second defendant stated that the said guarantee is subject to the collateral contract.

[18] The second defendant stated that immediately after the release of the loan facility, the first defendant had paid RM3m into one stock broking firm, Hwang DBS Securities Bhd ('HDBS') at the instruction of RMBB whereby the plaintiff had represented and warranted it would transfer the said RM3m to itself as settlement of the Sama Corp facility.

[19] According to the second defendant, RMBB had however breached the collateral contract as well as its own representation and warranty by failing to utilise the said RM3m to settle the Sama Corp facility but had instead use the same for its own unknown purposes. RMBB has further breached the collateral contract by failing to secure placement of the SamaWorld shares, which it has been agreed would source the repayment of the loan facility.

[20] Paragraph 16 of the statement of claim was admitted, but the second defendant averred that the said extension of time was meant for RMBB to secure placement of the SamaWorld shares. The second defendant averred that he had never received any notices of demand from the plaintiff.

[21] The second defendant prayed that the plaintiffs claim be dismissed with costs.

TERMS

[22] It must be observed firstly that since the fact of an oral contract is a fact asserted by the defendants, and is disputed by the other party, and the defence, the onus is upon the defendants to prove upon a balance of probabilities the existence and the terms of the oral contract, in particular, that the sale from the proceeds of the 10m shares in SamaWorld Malaysia charged to RMBB under the memorandum of deposit shall be the sole method of repayment of the facility.

[23] The concept of collateral contract has long been recognised by the courts. In *Heilbut, Symons & Co v Buckleton* [1913] AC 30. Lord Moulton, in an oft–quoted passage held:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and the status of a contract.

[24] If a collateral contract is recognised, there can be no objection that that collateral contract is oral and not written since there is no provision requiring a written agreement.

[25] The question whether oral evidence may be adduced to establish a collateral contract, in view of ss 91 and 92 of the Evidence Act 1950, was settled by the Federal Court in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, where it had this to say (at p 19):

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side the main agreement.

[26] The second defendant testified as DW–1 in support of the defendants' assertion of an oral collateral contract. DW–l's testimony essentially dealt with how the collateral contract came about. He maintained in cross-examination that such collateral contract existed. Further, DW–1 testified that had it not been for the collateral contract, he would not have entered into the loan agreement.

[27] Amarjit Singh Deo (DW–2), was the former General Manager of the first defendant and who represented the first defendant in that capacity in dealing with RMBB. DW–2 testified that there was a collateral contract. DW–2 testified that if the collateral contract was in place, DW–2 he '... would otherwise not recommend my Managing Director (DW–1) to sign a personal guarantee'. Zarul Ahmad Zulkifli

(DW–3), is an ex-officer of RMBB. He admitted in his testimony that there were discussions between RMBB and the defendants which brought about the collateral contract. He also testified during cross-examination that the loan amount was to be used to pay off the Sama Corp facility and that 'it was always the intention of the bank to recover the money by selling the shares'.

[28] Other evidence relied upon of the existence of a collateral contract was set out in the submissions as follows:

(a) By a letter dated 15 August 1992 at Bundle B p 155, the first defendant gave its mandate to RMBB to place out 20 to 30 million of its shares in SamaWorld (Malaysia) Sdn Bhd.

(b) On 21 August 1992, RMBB offered its services to SamaWorld (Malaysia) Sdn Bhd to raise US$150m credit facilities, which was accepted by SamaWorld (Malaysia) Sdn Bhd on 3 September 1992 (see Bundle B pp 261 & 265).

(c) Pursuant to the representations, the first defendant made an application for a loan to RMBB dated 29 October 1992 found at Bundle B p 156 where it clearly shows that the term of the source of repayment is 'Out of the sale of 10m Sama World (Malaysia) Sdn Bhd shares charged as security to the bank, which shares your bank has been mandated to place with investors'.

(d) Paragraph 5 of RMBB's letter of offer to the first defendant at Bundle B p 158 states the purpose of the loan as 'a bridging loan for your project funding requirements before the receipt of the balance of the proceeds from the sale of the Sama World (Malaysia) Sdn Bhd shares to Perbadanan Kemajuan Negeri Selangor due and payable to the company (the first defendant) on 17 December 1992 and from further placement of shares to other potential investors.

(e) Section 3.2 of the loan agreement at Bundle B p 90 states that the purpose of this loan is that it is a 'bridging loan for the funding of the project to be undertaken by the borrower's (the first defendant) subsidiary SamaWorld (Malaysia) Sdn Bhd known as SamaWorld Theme Park before the receipt of the balance of the proceeds from the sale of shares of SamaWorld (Malaysia) Sdn Bhd to other potential investors'.

(f) Section 6.1 of the loan agreement at Bundle B p 93 which deals with the repayment of the loan amount is silent as to the source of repayment.

(g) The letter of undertaking to repay the loan amount from the first defendant to RMBB dated 13 November 1992 at Bundle B p 167 where the first defendant undertook to 'forward to Rakyat Merchant Bankers Bhd the sum of $3m within one month from the date of our drawdown of the said same amount under SamaWorld Asia Sdn Bhd (first defendant)'.

(h) The letter dated 23 May 1994 from the first defendant to RMBB at Bundle B p 210 confirmed that the 'source of repayment (of the loan amount) is from the sale of SamaWorld (Malaysia) Sdn Bhd's shares which have been pledged with you as security for the above loan (ie, the loan agreement). The placement

of these shares is also being done by your bank, for which we have given you a mandate.' RMBB replied vide its letter dated 13 June 1994 found at Bundle B p 214A.

(i) The letter dated 27 March 1996 from the first defendant to BSN at Bundle B p 242D confirmed that the 'proceeds of drawdown of the above loan of RM3m on 16 November 1992 were wholly and of a similar amount due from Sama Corporation Sdn Bhd which company had been wound up by the court on 9 December 1988'. There was no reply from BSN or the plaintiff to this letter. It must be noted that the plaintiff never called Mr Lim Khee Joo, to deny this.

[29] Nor Hishamuddin bin Mohd Nizar (PW–1) was not in any real position to testify against the existence of an oral collateral contract. The court accepts there was some understanding between the parties, but to be of any value as an oral collateral agreement, it is necessary to establish, upon the civil standard of proof, the terms of the oral agreement.

[30] It is not unusual in the normal business of a merchant bank to be authorised to place out shares for a customer. Clearly the plaintiff as a merchant bank accepted that function from the first defendant in respect of the shares in SamaWorld (Malaysia) Sdn Bhd, and offered its services to SamaWorld (Malaysia) Sdn Bhd to raise US$150m for the latter. This has no bearing one way or another upon the RM3m facility which is the subject of this action.

[31] It was submitted that the first defendant's application to RMBB for a loan set out the source of repayment. What was stated was, as quoted by counsel is:

> Out of the sale of 10m SamaWorld (Malaysia) Sdn Bhd shares charged as security to the bank, which shares your bank has been mandated to place with investors.

[32] RMBB's Letter of Offer dated 29 October 1992 set out the terms of its offer. Nothing in the offer referred to the source of repayment as the sale of the 10m shares. Indeed, while it is true the first defendant offered the source of repayment as out of the sale of the 10m shares, there was no suggestion even by the first defendant that that is the sole source of repayment. It is inconceivable that any lender would accept the sale of assets in the form of shares as the sole source of repayment, for that would deny it from other avenues of recourse if the sale of shares would fail. The terms of the letter of offer make it abundantly clear that RMBB was not ready to deny itself other avenues of recourse.

[33] The purpose of loan as set out in the RMBB's letter of offer is:

> As a bridging loan for your project funding requirements before the receipt of the balance of proceeds from the sale of SamaWorld (Malaysia) Sdn Bhd shares to Perbadanan Kemajuan Negeri Selangor due and payable to the company on 17 December 1992 and from further placement of shares to other potential investors.

[34] It is trite that the purpose of a loan does not confine the source of repayment of the loan from that purpose only. While the purpose of a loan may be an

investment that is the source of expectations of obtaining money for repayment, too often such investments become the source of grief since risk is inherent in business ventures. On the other hand, a lender, holding the money, has the luxury of demanding security to minimise of not eliminating any risk of non-repayment. The sale of the shares to Perbadanan Kemajuan Negeri Selangor and to other potential investors have not been shown to be compelling reasons for RMBB to forgo the usual recourse to security for repayment.

[35] It was submitted that s 6.1 of the short term facility agreement dated 12 November 1992 is silent as to the source of repayment. On careful reflection, far from supporting the argument that the sole source of repayment is from the disposal of the 10m shares, the silence as to source of repayment keeps open the source of repayment. Since there is no rule that only a borrower whose use of the loan is successful needs to repay while one who failed is not obliged to pay, it follows that the source of repayment is irrelevant but a borrower must repay. The letter of undertaking dated 13 November 1992 by the first defendant, and the guarantee as required under the letter of offer are consistent with this conclusion.

[36] The first defendant's letter of 25 May 1994 sought further time of one year to repay and that the first defendant's source of repayment is from the sale of SamaWorld (Malaysia) Sdn Bhd's shares, which have been pledged as security for the above loan. On 13 June 1994 RMBB replied that they were pleased to inform that the repayment of the loan was extended to 31 May 1995 or upon completion of the sale of the 10m SamaWorld (Malaysia) Sdn Bhd's shares pledged to RMBB, whichever is the earlier. It further stated in case that only part of the 10m shares are sold, a proportion of proceeds received must nevertheless be utilised to reduce the loan proportionately and the loan will be reviewed on 30 September 1994. All other terms and conditions remained unchanged. The first defendant acknowledged acceptance of these terms.

[37] The first defendant's reference in that letter to sale of the SamaWorld (Malaysia) Sdn Bhd's shares as source of repayment is nothing more than to provide a basis for the term of one year of extension sought. The RMBB reply gave extension until the sale of the shares or 31 May 1995, whichever is the earlier.

[38] Now, if there had been an oral collateral agreement that the sole source of repayment is to be from the disposal of the SamaWorld (Malaysia) Sdn Bhd shares, there would have been no need to seek an extension of time for repayment. The request for extension of time contradicts the assertion that the loan would only be repaid if the shares are sold. No mention of it was made in the letter. The first defendant is estopped by its letter from asserting after the date of that letter that there is any subsisting collateral agreement that the loan would only be repaid if the shares were sold. Further, having acknowledged and accepted the RMBB letter of 13 June 1994 without any qualification as to any oral collateral contract, any previous collateral agreement if any would cease to be in force between the first defendant and the plaintiff.

A **[39]** It was submitted that by October 1992, the placement of the share exercise and the agreement to raise US$150m for SamaWorld (Malaysia) Sdn Bhd were already in place, and thus, it is highly improbable that the first defendant would apply for a further loan of RM3m for the purpose as stated earlier above unless RMBB made the representations that the defendants need not repay the loan amount as the source of repayment is by the sale of the 10m SamaWorld (Malaysia) Sdn Bhd's shares pledged with RMBB.

[40] The submission is not borne out by either reason or the evidence. It is speculative. While the parties may have in mind that the shares pledged may have a considerable value, that has nothing to do with and does not contradict an application and need for immediate cash or cash in the short term, to honour payments that are due. While cash may be an asset, assets are not necessarily cash, and many an asset rich company has been wound up when it did not have the cash to meet payments as they fall due.

[41] Neither too can the speed of the application and the signing of the agreement be a basis to question the bona fides of the grant of the loan. If two weeks is too fast a period, business would grind to a snail's pace.

[42] It was then submitted that: 'More importantly, given that the loan of RM3m was only for a short tenure of three months, the inference is that the loan amount will be repaid by the sale of the SamaWorld (Malaysia) Sdn Bhd shares'.

[43] All that can be said the inference sought does not necessarily follow from the event relied upon. The same applies in respect of the submission that it is also highly unusual for the first defendant to give an undertaking to RMBB (referred to in para 13.7 above) that it will 'forward' the loan amount to RMBB within one month from the date of drawdown. The more correct inference to be drawn is that RMBB wanted an assurance by the first defendant that the loan amount will be returned (which was done) for the repayment of the Sama Corp facility. The undertaking was consistent with such an inference.

[44] It was also submitted that the direct assertion by the first defendant in its letter dated 23 May 1994 was never rebutted by RMBB. The reply by RMBB merely states that the repayment of the loan has been extended. Further, there is a confirmation by RMBB that it will place out the 10m shares pledged to it. The inference it was submitted is that there was indeed an agreement between RMBB and the defendants that the defendants need not repay the loan amount from their own pockets.

[45] That submission is not supported by the letter of 23 May 1994 and the RMBB reply of 13 June 1994. The reply set a dateline of acknowledgement and acceptance by 20 June 1994 and the first defendant complied and accepted the terms.

[46] It is evident that the defendants have failed to prove on a balance of probabilities the existence of an oral collateral contract that the sole source of repayment of the facility is from the sale of the charged shares, and the defence on this ground must fail.

[47] The first defendant had submitted that RM7,800,000 was paid as full settlement by Samanda Holdings Bhd as the corporate guarantor. It would seem that if Samanda Holdings as the corporate guarantor had been prevailed upon by RMBB to pay more than what is due from it as corporate guarantor, the remedy is for it to recover from RMBB, or for Samanda Holdings Bhd to recover the indemnity from Sama Corp as the principal debtor of the facility. There is no evidence before the court of any such recovery by Samanda Holdings Bhd from any of the defendants. That in any case is a separate atter and is not a defence for a loan given by the plaintiff to the defendant hich has not been repaid. That the first defendant had no knowledge of the hereabouts of the loan amount does not assist the defendants is proving their laim, and does not support the argument that there has been a failure of consideration.

[48] Although it was averred by the second defendant that he had only agreed to guarantee up to a limit of RM1m and not RM3m, there is no evidence advanced and no submissions made on this point. The court, therefore, considers the alternative averment in para 12 of the second defendant's defence as abandoned.

[49] The plaintiff having therefore succeeded to prove its case upon a balance of probabilities, judgment was entered for the plaintiff per prayer 23(a), 23(c), 23(d) and under 23(e) interest on principal of RM3m on terms otherwise as at prayer 23(b).

Plaintiff's claims allowed.

Reported by Sally Kee